



FEDERAL ELECTION COMMISSION

11 CFR Part 110

[NOTICE 2015-11]

Candidate Debates

AGENCY: Federal Election Commission.

ACTION: Notice of Disposition of Petition for Rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking (“petition”) filed on September 11, 2014, by Level the Playing Field. The petition asks the Commission to amend its regulation on candidate debates to revise the criteria governing the inclusion of candidates in presidential and vice presidential candidate debates. The Commission is not initiating a rulemaking at this time.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The petition and other documents relating to this matter are available on the Commission’s website, www.fec.gov/fosers (reference REG 2014-06), and in the Commission’s Public Records Office, 999 E Street, NW., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On September 11, 2014, the Commission received a Petition for Rulemaking from Level the Playing Field regarding the Commission’s regulation at 11 CFR 110.13(c). That regulation governs the criteria that debate staging organizations (which

the petitioner refers to as “sponsors”) use for inclusion in candidate debates. The regulation requires staging organizations to “use pre-established objective criteria to determine which candidates may participate in a debate” and further specifies that, for general election debates, staging organizations “shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.” 11 CFR 110.13(c). The petition asks the Commission to amend 11 CFR 110.13(c) in two respects: (1) to preclude sponsors of general election presidential and vice presidential debates from requiring that a candidate meet a polling threshold in order to be included in the debate; and (2) to require sponsors of general election presidential and vice presidential debates to have a set of objective, unbiased criteria for debate participation that do not require candidates to satisfy a polling threshold.

The Commission published a Notice of Availability seeking comment on the petition on November 14, 2014. *Candidate Debates*, 79 FR 68137. The Commission received 1264 comments in response to that notice. One comment, that of an organization that stages presidential and vice presidential debates, opposed the petition; the remaining comments either supported the petition or took no position thereon.

The petition and many of the comments supporting it argue that a staging organization’s requirement that a candidate meet a polling threshold for inclusion in a debate unfairly benefits major party candidates at the expense of independent and third party candidates. As an alternative, the petition and some of the comments proposed requiring staging organizations to include each candidate who has qualified for the general election ballot in states that collectively

have enough Electoral College votes for the candidate to attain the presidency.¹ The petition states that this would provide an objective, and more inclusive, criterion preferable to polling thresholds. Other commenters did not necessarily support or oppose the petitioner’s proposed alternative but supported a rulemaking to determine if changes are warranted. Still other commenters proposed alternative and additional rule modifications for the Commission’s consideration, such as a requirement that debate staging organizations provide the public with information about candidates not included in a debate.

The commenter that opposed the petition urged the Commission to continue allowing a debate staging organization substantial discretion in formulating the nonpartisan objective candidate selection criteria of its choice. This commenter further argued that its particular polling thresholds are reasonable and objective selection criteria adopted for nonpartisan reasons and designed to advance voter education. This commenter also asserted that the petitioner’s proposed alternative would favor early ballot qualification by candidates with the most resources over more meaningful measures of candidate support and viability.

The Commission has evaluated the petition and comments and decided not to initiate a rulemaking to amend 11 CFR 110.13(c) at this time.

As the Commission stated in adopting the current candidate debate rule in 1995, “the purpose of section 110.13 . . . is to provide a specific exception so that certain nonprofit organizations . . . and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates.” Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR 64260,

¹ Specifically, the petitioner proposes that a presidential candidate who, at a given date during the election year, has secured ballot access in states that collectively have at least 270 Electoral College votes (of a total possible 538 votes), could potentially qualify to participate in the general election debate.

64261 (Dec. 14, 1995).² Accordingly, the Commission has required that debate “staging organizations use pre-established objective criteria to avoid the real or apparent potential for a quid pro quo, and to ensure the integrity and fairness of the process.” Id. at 64262. In discussing objective selection criteria, the Commission has noted that debate staging organizations may use them to “control the number of candidates participating in . . . a meaningful debate” but must not use criteria “designed to result in the selection of certain pre-chosen participants.” Id. The Commission has further explained that while “[t]he choice of which objective criteria to use is largely left to the discretion of the staging organization,” the rule contains an implied reasonableness requirement. Id. Within the realm of reasonable criteria, the Commission has stated that it “gives great latitude in establishing the criteria for participant selection” to debate staging organizations under 11 CFR 110.13.³ First General Counsel’s Report at n.5, MUR 5530 (Commission on Presidential Debates) (May 4, 2005), <http://eqs.fec.gov/eqsdocsMUR/000043F0.pdf>.

The Commission has a well-established history of ensuring that corporate contributions are not made to candidates taking part in debates, including by evaluating the objectivity and neutrality of a debate staging organization’s selection criteria in the Commission’s enforcement process. Enforcement matters regarding that issue have involved a wide range of candidate selection criteria, including polling thresholds (from 5% to 15%), campaign finance activity levels (such as a minimum number of contributors as shown in reports filed with the Commission), campaign engagement levels (such as numbers of yard signs or participation in

² See also Funding and Sponsorship of Federal Candidate Debates, 44 FR 76734 (Dec. 27, 1979) (explaining that, through candidate debate rule, costs of staging multi-candidate nonpartisan debates are not contributions or expenditures); 11 CFR 100.92 (excluding funds provided for costs of candidate debates staged under 11 CFR 110.13 from definition of “contribution”); 11 CFR 100.154 (excluding funds used for costs of candidate debates staged under 11 CFR 110.13 from definition of “expenditure”).

³ See Candidate Debates and News Stories, 61 FR 18049 (Apr. 24, 1996) (quoting H.R. Rep. No. 93-1239 at 4 (1974)).

neighborhood association meetings), ballot access, and office eligibility. See, e.g., First General Counsel's Report at 5 n.5, MUR 5530 (Commission on Presidential Debates) (May 4, 2005), <http://eqs.fec.gov/eqsdocsMUR/000043F0.pdf> (including 15% polling threshold and ballot access criteria). In each of these matters, the Commission evaluated whether the criteria were objective, pre-established, and not arranged in a manner to promote or advance one candidate over another so as to constitute corporate contributions to the participating candidates.

In these enforcement matters, the Commission has carefully examined the use of polling thresholds and found that they can be objective and otherwise lawful selection criteria for candidate debates. Indeed, almost two decades ago, the Commission found that a staging organization's use of polling data (among other criteria) did not result in an unlawful corporate contribution, with five Commissioners observing that it would make "little sense" if "a debate sponsor could not look at the latest poll results even though the rest of the nation could look at this as an indicator of a candidate's popularity." MUR 4451/4473 Commission Statement of Reasons at 8 n.7 (Commission on Presidential Debates) (Apr. 6, 1998), http://www.fec.gov/disclosure_data/mur/4451.pdf#page=459. Citing this statement, one court noted with respect to the use of polling thresholds as debate selection criteria that "[i]t is difficult to understand why it would be unreasonable or subjective to consider the extent of a candidate's electoral support prior to the debate to determine whether the candidate is viable enough to be included." Buchanan v. FEC, 112 F. Supp. 2d 58, 75 (D.D.C. 2000).

Because the regulation at issue is designed to provide debate sponsors with discretion within a framework of objective and neutral debate criteria, and because the Commission can evaluate the objectivity and neutrality of a debate sponsor's selection criteria through the enforcement process, the Commission finds that the rulemaking proposed by the petition is not

necessary at this time. The Commission concludes that section 110.13(c) in its current form provides adequate regulatory implementation of the corporate contribution ban and is preferable to a rigid rule that would prohibit or mandate use of particular debate selection criteria in all debates. See 11 CFR 200.5(c) (listing desirability of proceeding on case-by-case basis as consideration in declining to initiate rulemaking); see also MUR 4451/4473 Commission Statement of Reasons at 8-9 (Commission on Presidential Debates) (noting that Commission cannot reasonably “question[] each and every . . . candidate assessment criterion” but can evaluate “evidence that [such a] criterion was ‘fixed’ or arranged in some manner so as to guarantee a preordained result”).

The petition and the commenters who support it rely primarily on policy arguments in favor of debate selection criteria that would include more candidates in general election presidential and vice presidential debates. The rule at section 110.13(c), however, is not intended to maximize the number of debate participants; it is intended to ensure that staging organizations do not select participants in such a way that the costs of a debate constitute corporate contributions to the candidates taking part. Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR at 64261-62. Staging organizations’ use of polling criteria is a reasonable way for a debate staging organization to select and “control the number of candidates participating in . . . a meaningful debate,” id., and to do so in a way that is objective and does not constitute a corporate contribution. A per se rule prohibiting the use of polling criteria is therefore not necessary to prevent debates from constituting unlawful contributions.

Furthermore, the rule at 11 CFR 110.13(c) already permits the use of criteria by staging organizations that could result in larger numbers of candidates participating in debates. Indeed,

the specific criterion that the petition asks the Commission to include in a revised section 110.13(c) is already lawful: A debate staging organization has the discretion to stage a general election presidential or vice presidential debate using selection criteria similar to the Electoral College approach preferred by the petitioner (so long as the organization’s reasonable selection criteria are pre-established, objective, and not designed to result in the selection of certain pre-chosen participants). No rule change is necessary to enable that approach, and the petitioner may sponsor a debate using such criteria or persuade a debate sponsor to do so.⁴

The petition sets forth certain data in support of its argument that the use of polling thresholds as a debate selection criterion by one staging organization “creates a hurdle that third-party and independent candidates cannot reasonably expect to clear,” and therefore is designed to result in the selection of certain pre-chosen participants. Petition at 15. The use of polling data by a single debate staging organization for candidate debates for a single office, however, does not suggest the need for a rule change. The Commission acknowledges that lower (or no) polling threshold selection criteria may open debates to more candidates and that polling thresholds could be used to promote or advance one candidate (or group of candidates) over another. But to the extent that a debate staging organization uses non-objective selection criteria “designed to result in the selection of certain pre-chosen participants,” this would already be unlawful under the Commission’s existing regulation. Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR at 64262.

⁴ If the petitioner (or another entity) is unsure whether it is a debate “staging organization” as defined in 11 CFR 110.13(a), it may ask the Commission for an advisory opinion on the matter. See, e.g., Advisory Opinion 1988-22 (San Joaquin Republicans) (concluding that advisory opinion requestor, which did not yet have relevant tax status, was not within candidate debate exemption). Similarly, if a debate staging organization wishes to ask the Commission to conclude that its proposed candidate selection criteria are objective and not designed to result in the selection of certain pre-chosen participants (and thus protect itself from a later enforcement action), it may seek an advisory opinion on that question. See 52 U.S.C. 30108(c) (establishing scope of protection of advisory opinions).

Finally, the Commission notes that the petition focuses on and seeks to amend the rule only with respect to polling threshold criteria in the selection of participants for presidential general election debates. However, the candidate debate rule applies to all debates (primary and general election) “at the presidential, House, and Senate levels.” Funding and Sponsorship of Candidate Debates, 44 FR 39348 (July 5, 1979).⁵ In the absence of any indication that polling thresholds are inherently unobjective or otherwise unlawful as applied to all federal elections (and the Commission is aware of no such indication⁶), the Commission declines to initiate a rulemaking that would impose a nationwide prohibition on the use of such thresholds, or that could result in giving different legal effect to the use of polling criterion in different elections.

For all of the above reasons, the Commission therefore declines to commence a rulemaking to amend the criteria for staging candidate debates in 11 CFR 110.13(c).

On behalf of the Commission,

Dated: _November 9, 2015.

Ann M. Ravel,
Chair,
Federal Election Commission.

⁵ Indeed, the Commission has analyzed, in the enforcement context, debate staging organizations’ criteria under 11 CFR 110.13(c) at all levels of federal elections. See, e.g., MUR 5650 (Associated Students of the Univ. of Arizona) (Senate debate); MUR 5530 (Commission on Presidential Debates) (presidential general election debates).

⁶ The petitioner provided data intended to demonstrate that polling figures are sometimes inaccurate, but the fact that polls can be inaccurate does not mean that a staging organization acts unobjectively by using them.

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